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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID BOULIGNY,

Defendant and Appellant.

B203234

(Los Angeles County  
Super. Ct. No. KA076379)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Tia Fisher, Judge. Affirmed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted David Bouligny (defendant) of second degree robbery (count 1) (Pen. Code, § 211).<sup>1</sup> Defendant admitted having suffered two prior convictions of a serious or violent felony within the meaning of sections 1170.12, subdivisions (a) through (d); 667, subdivisions (a)(1) and (b) through (i); and 667.5, subdivision (b).

After denying defendant's *Romero*<sup>2</sup> motion, the trial court sentenced defendant to an aggregate term of 37 years to life. The sentence consisted of 25 years to life in count 1 as a third strike, two consecutive years for defendant's prison priors, and five consecutive years for each of two serious prior felony convictions under section 667, subdivision (a)(1).

Defendant appeals on the grounds that: (1) the evidence presented at trial was not sufficient to support the robbery conviction, and (2) the trial court abused its discretion by denying defendant's motion to strike one prior conviction.

## **FACTS**

### **Prosecution Evidence**

On September 12, 2006, at approximately 8:35 p.m., Claudia Esquivel (Esquivel) was shopping at a discount store in the City of Covina. She returned to her car carrying some pillows and a purse. She opened the driver's side door and was preparing to put her purse on the passenger seat when she heard someone say, "Get up in the car, you bitch." The person who said this, later identified as defendant, was behind her. Defendant then put his hands around her neck. Esquivel did not see a knife but believed she felt one.

Defendant pushed Esquivel into the corner of the car door, and she began to scream. Defendant kept telling her to get in the car, and he covered her mouth so that she could not scream. At that point, Esquivel lowered herself down toward the floor of her SUV and pulled defendant's hand from her mouth and continued screaming. Defendant told her she was taking too much time, but Esquivel resisted getting in the car. Defendant

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<sup>1</sup> All further references to statutes are to the Penal Code unless stated otherwise.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

pushed her and then picked her up. Esquivel turned toward him and told him to take everything. At that point, she was able to see a little bit of his face. She noted that he appeared to have facial hair, as if he had not shaved for one or two days. Defendant then pulled the car keys from her hand, and the keys fell between the car seat and the door.

Defendant let Esquivel walk away, and she went back to the discount store to call the police while defendant sat in her car. Esquivel's purse was still in the car. Esquivel identified defendant on the night of the incident when he was shown to her in the parking lot of the nearby North Woods Inn, and she also identified him in court. On cross-examination, Esquivel acknowledged that she had described her assailant as Black several times on the night of the incident. She explained that it was dark in the parking lot of the discount store.

Randolph Ruiz-Lovera (Ruiz-Lovera) was sitting outside Spike's restaurant near the discount store on the night of the robbery. He realized that a woman was yelling, and he saw her leave a car and run towards the discount store. Immediately afterwards, a man that was at the woman's car entered the car. Shortly thereafter, the man left the car and ran away carrying a bag. Ruiz-Lovera watched the man as he ran in a northeasterly direction, and he saw him go behind a building. After spending about 15 seconds behind the building, the man came out and began walking away from the building. Ruiz-Lovera saw a police car approach the man, and the man began running. Ruiz-Lovera saw the police catch him. Ruiz-Lovera later told police he was certain that the man who robbed the woman was the same man the police chased.

Ruiz-Lovera went behind the building where he had seen the man disappear for 15 seconds, and he found a purse. He saw a wallet, cards, and other things on a stairway. He later took police to the spot. Ruiz-Lovera described the culprit as a White man with no hair. He recalled telling police that the person he saw wore shorts, a cap, and possibly a white T-shirt. He saw no other person along the route taken by the man.

Officer Michael Taron of the City of Covina police department was dispatched to the scene. The dispatcher described a robbery by a male Black wearing a white T-shirt and blue jean shorts. Officer Taron was driving in a parking lot when he saw a subject

walking southbound and matching the general description. Because of the late hour and the shade from the cap, the subject appeared to be a dark-skinned male, and possibly a male Black. He appeared to be unshaven, which gave him a darker appearance. Officer Taron identified defendant in court as the suspect he saw that night.

Officer Taron drove toward defendant and pulled up approximately 30 feet away. After ignoring Officer Taron's orders to stop, defendant ran across the street through traffic towards the North Woods Inn. Officer Taron immediately reported he had a subject running from him as well as the subject's description and direction of travel. Other police units responded to the North Woods Inn.

When Officer Taron arrived at the inn he found the subject squatting down behind the wall. The subject ignored an order to get on the ground and ran westbound around the restaurant, where he was caught by other officers. Officer Taron stated that the person taken into custody was the same person who had run from him originally. Officer Taron stated that defendant looked lighter in court than he did in September 2006.

In a rear stairwell of a convalescent home next to the North Woods Inn, Officer Paul Barraco recovered Esquivel's identification and credit cards. He recovered a pink cell phone, currency, and cards belonging to Esquivel in the parking lot of the North Woods Inn.

### **Defense Evidence**

Defendant presented no affirmative evidence in his defense.

## **DISCUSSION**

### **I. Sufficiency of the Evidence for Robbery**

#### ***A. Appellant's Argument***

Appellant contends that the evidence shows his use of force was not related to taking property from Esquivel. Defendant did not demand anything material from Esquivel--only that she get in the car. Because the evidence fails to show that defendant's intent to take property was formulated before or during the time he used force or fear, the evidence is insufficient to sustain the jury's verdict in count 1.

### ***B. Relevant Authority***

The standard of appellate review for sufficiency of evidence was articulated in *People v. Johnson* (1980) 26 Cal.3d 557. When an appellate court seeks to determine whether a reasonable trier of fact could have found a defendant guilty beyond a reasonable doubt, it ““must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” (*Id.* at p. 576.) The court does not limit its review to the evidence favorable to the respondent, but must resolve the issue in light of the whole record and must determine whether the evidence of each essential element is substantial. (*Id.* at p. 577.) “[S]ubstantial evidence” is evidence that is “reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*Id.* at p. 578.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

### ***C. Evidence Sufficient***

We believe substantial evidence supports the jury’s verdict in count 1. Robbery requires the jury to find that the “intent to steal arose either before or during the commission of the act of force” (*People v. Marshall* (1997) 15 Cal.4th 1, 34) because

“‘[i]f [the] intent to steal arose after the victim was assaulted, the robbery element of stealing by force or fear is absent’” (*People v. Huggins* (2006) 38 Cal.4th 175, 214).

Esquivel testified that defendant came up behind her after she opened the driver’s side door of her car and told her to get in the car. She screamed and resisted and, when defendant tried to push her into the car, she crouched down. Defendant then picked her up and, as Esquivel turned towards him and fearfully told him to “take everything,” defendant pulled the car key from her hand. Esquivel then left the area of her car while defendant remained at the car. Thus, the record shows that defendant possessed the intent to take Esquivel’s property, and did take her property, at the same time that he exercised force and fear upon her.

It is of no significance that defendant ultimately did not steal Esquivel’s car or that he actually took her purse after she had walked away. Defendant may have thought it likely that his victim had reported the car as stolen and that driving it would lead to his apprehension. As stated in *People v. Brito* (1991) 232 Cal.App.3d 316, “a defendant who applies force with the intent to steal, has committed one robbery notwithstanding the number of items he steals during an indivisible transaction, until he has reached a place of safety. It follows that if he conceives the intent to steal a different item after he has finished applying the force to his victim, he is guilty of robbery, not grand theft of that item.” (*Id.* at p. 326, fn. 8.) In addition, the taking of another person’s property “includes forcing or frightening a victim into leaving the scene, as well as simply deterring a victim from preventing the theft or attempting to immediately reclaim the property.” (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771; see also *People v. Hays* (1983) 147 Cal.App.3d 534, 541-542 [intended victim fled in fear before taking of property by robbers].)

Although the force and fear exercised upon Esquivel was accompanied by defendant trying to force her into the car, it was hardly necessary for the jury to accept defendant’s suggestion that he was seeking to commit some crime other than the taking of Esquivel’s property. The jury was well aware of defendant’s contention from defense counsel’s argument. The jury was instructed that, in order to prove that defendant committed a robbery, the People were obliged to prove that defendant took property not

his own from another person's possession and immediate presence, that the property was taken against that person's will, that the defendant used force or fear to take the property or to prevent the person from resisting, and that when the defendant used force or fear to take the property he intended to deprive the owner of it permanently. (Judicial Council of Cal. Crim. Jury Instns. (2007-2008) CALCRIM No. 1600.) Significantly, the jury was also instructed that defendant's intent to take the property must have been formed before or during the time he used force or fear, and if the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. (CALCRIM No. 1600.)

The trial court also told the jury that "every crime or allegation charged in this case requires proof of the union, or joint operation, of act and wrongful intent." (CALCRIM No. 251.) The jury was instructed that the People had to prove not only that defendant committed the robbery but that he acted with a particular intent, which was subject to being proved by circumstantial evidence. The jury was also told it had to be convinced that the only reasonable conclusion supported by the circumstantial evidence was that defendant had the required intent. (CALCRIM No. 225.) The jury had the option of finding defendant guilty of petty theft by larceny, but it chose not to do so. (CALCRIM No. 1800.) As we have noted, "it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean*, *supra*, 46 Cal.3d at p. 933.) Defendant's argument is without merit.

## **II. Denial of Defendant's *Romero* Motion**

### ***A. Defendant's Argument***

Defendant contends that the trial court's decision not to strike one of his prior strike convictions was not based on an individualized consideration of the relevant factors in his case. As his trial counsel argued, had appellant been sentenced as a two-strike offender, he would have received a sentence of 17 years, of which he would be required to serve 85 percent. This would have been a substantial sentence and, given defendant's age of 39, it would have protected the interests of public safety and reduced the

possibility of further recidivism. The trial court therefore abused its discretion, and remand for resentencing is required.

***B. Relevant Authority***

We review the trial court's ruling for abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*); *Romero, supra*, 13 Cal.4th at p. 530; see also *People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) The burden is on the party attacking the sentence to establish that the sentencing decision was irrational or arbitrary. (*Carmony, supra*, at p. 376.) "It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

"The touchstone of the analysis [of a trial court's ruling on a *Romero* motion] must be 'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citations.]" (*People v. Philpot* (2004) 122 Cal.App.4th 893, 905, quoting *Williams, supra*, 17 Cal.4th at p. 161.)

***C. No Abuse of Discretion***

In making its ruling, the trial court amply demonstrated that it was following the precepts of *Romero* and *Williams* in denying appellant's *Romero* motion. The court stated that it had considered defendant's criminal history but noted that this was not the entire consideration. The court stated that the criminal history was extensive, as shown by both the probation report and the section 969 packets the prosecutor had provided with respect to the prior convictions. The trial court considered the current crime, whether the prior offenses had occurred during an aberrant period of an otherwise law-abiding life, whether the priors were remote, and whether they involved violence or weapon-use.

The trial court observed that in one conviction for assault with a deadly weapon in violation of section 245, subdivision (a)(1), there was an allegation that defendant had used an ice pick. In defendant's prior robbery conviction the allegations were similar to the instant case—that defendant had approached someone in a parking lot and held a knife to the person's throat. Even though defendant never admitted any weapon use, the prior offenses, even as pleaded to, were serious and violent crimes. The trial court had also been struck by the fact that defendant was released on his last parole violation on September 8, 2006, and the instant crime occurred on September 12, 2006. The court acknowledged that defendant had experienced serious drug problems throughout his life; however, based on its analysis of the facts of the case, defendant's prior history, and the circumstances of the prior crimes, it believed defendant fell squarely within the spirit of the three-strikes law. The court concluded, "I think it would be an abuse of discretion, frankly, in your circumstance to strike one of these priors. So the motion to strike the prior pursuant to [section]1385 is denied."

We believe it is not necessary to reiterate the "particulars of [defendant's] background, character, and prospects," since the trial court clearly was aware of its obligation to consider these factors and did so with great thoroughness. (*Williams, supra*, 17 Cal.4th at p. 161.) The trial court followed the principles that must guide a court that seeks to comply with section 1385, subdivision (a)--principles that were explained and reaffirmed in *Romero, supra*, 13 Cal.4th at pages 530-531 and elaborated upon in *Williams, supra*, 17 Cal.4th at pages 160-161.

We cannot say that the court's assessment of defendant's background, character, and prospects was arbitrary or capricious. The trial court clearly believed defendant was a danger to society, and as emphasized in *People v. Garcia* (1999) 20 Cal.4th 490, when deciding whether to strike prior convictions under section 1385, the trial court must consider not only the constitutional rights of the defendant, but also "“the interests of society represented by the People. . . .””” (*Id.* at pp. 497-498.) The trial court did not abuse its discretion.

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
ASHMANN-GERST